Supreme Court, U.S.
FILED

No. 041529 MAR 7 2005

OFFICE OF THE CLERK

IN THE
Supreme Court Of The United States

MARY S. SMITH

Petitioner,

v.

403 C STREET LLC, VIRGINIA AVENUE LLC,
STANFORD DEVELOPMENT GROUP

Respondents.

On Petition for Writ of Certiorari
To The Court of Appeals of The District of Columbia

PETITION FOR WRIT OF CERTIORARI

Mary S. Smith
Pro Se
529 G Street SE
Washington DC 20003
(202)546-0189

QUESTIONS PRESENTED

I. Whether the rulings by the District of Columbia's Court of Appeals denied Petitioner Substantive Due Process, as Petitioner was given no opportunity to argue her case on appeal; neither the Respondent nor the court made reference to legal issues put forth in Petitioner's Appeals briefs; and the D.C. Court of Appeals failed to provide any adequate rationale for its rulings.

II. Whether the District of Columbia's Court of Appeals Denied Petitioner Procedural Due Process by granting a Summary Affirmance before Petitioner could respond, and then by considering Respondents' procedurally improper Appeals briefs, while failing to give full consideration to Petitioner's procedurally proper briefs.

III. Whether, through complete silence on the legal issues presented, the D.C. Court of Appeals erred by passively affirming the errors of the Trial Court including 1) the erroneous reliance on the "imminence" of irreparable harm as a criterion for issuance of permanent injunctive relief, 2) the erroneous failure to consider and apply District of Columbia statutory provisions which prohibit destruction of trees belonging in whole or part to others, and 3) the erroneous failure to admit and consider evidence of the public interest when balancing the equities of injunctive relief.

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F. 8/22/01 Superior Court Consent Temporary Restraining Order Establishing Irreparable Harm And Protecting Trees.
G. 11/15/01 Superior Court Consent Preliminary Injunction Reiterating Irreparable Harm finding And Protecting Trees.
H. 12/28/01 Superior Court Jacket Entry Establishing Injunctive Protection/Finding Irreparable Harm For One Large Tree, Denying Protection of Other Trees, and Denying Partition.
I. 11/20/02 Superior Court Jacket Entry Denying Both Partition and Injunction. Transcript Excerpts Showing Rationale.
J. 5/7/03 Superior Court Order Requiring an Expert Report and Measures to Stabilize the Tree After Critical Roots Were Severed Following Denial of the Injunction.
K. 6/18/03 Superior Court Order Denying Petitioner's Motion for Reconsideration.

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KEY OPINIONS AND ORDERS

8/22/01 A Consent Temporary Restraining Order found "the Plaintiff... will suffer irreparable harm in the event that the Defendants ... cuts the trees ... along the property line between the Plaintiff's property and the Defendants' property".

11/15/01 A Consent Preliminary Injunction reiterated the irreparable harm finding.

12/28/01 Irreparable Harm was found for one large tree, but not for smaller boundary line trees. A Counterclaim for partition of the tree was denied. The Jacket entry is quoted for brevity.

11/20/02 In a verbal ruling evidenced by a jacket entry (no written order exists); Partition was denied again and a Permanent Injunction was also denied. A full discussion of the decision and quotes from it are included in Petitioner's Appeal Brief . The Court's stated that its decision was based on testimony that Respondents did not have specific and immediate plans to destroy the tree.

5/7/03 An expert report and measures to stabilize the tree were ordered, as Respondents had severed critical roots following denial of the Injunction.

6/18/03 Petitioner's request for reconsideration, alleging that the measures were not sufficient to protect the tree from collapse, was denied.

8/20/04 The Appeals Court granted Respondents' Motion for Summary Affirmance of the Superior Court Orders on Appeal.

12/6/04 The Appeals Court denied rehearing/ rehearing en-banc.

JURISDICTION

The final decision of the District of Columbia Court of appeals was entered on December 6, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257.

CONSTITUTIONAL PROVISIONS

United States Constitution, Article III, §§ 1 provides, in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."
United States Constitution, Article V, provides in pertinent part " No person shall be... deprived of life, liberty, or property, without due process of law"

United States Constitution, Article III, §§ 1 provides, " No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

This section summarizes facts, testimony and briefs already on record. All of the assertions herein can be proven by the trial record and the specific citations to the record are included in Petitioner's Briefs to the D.C. Court of Appeals.

Petitioner, a small property owner in the District of Columbia, sought injunctive relief to protect the structure of her 17 unit historic apartment building from harm due to dangerous construction practices by Respondents, and to protect a boundary line tree owned as Tenants in Common with Respondents, a real estate development group.

During the trial phase, Injunctive relief concerning hazardous construction practices was denied as administrative remedies had not been exhausted, but the issue of protecting the tree remained. A series of Temporary Restraining Orders and Preliminary Injunctions were issued as Respondents repeatedly cut the roots of the tree closer and closer to the trunk over a course of months. A motion by Respondents for partition of the tree was denied and Irreparable Harm to Petitioner should the tree be destroyed was established in a series of Temporary Restraining Orders and Preliminary Injunctions (see Opinions and Orders).

At the Permanent Injunction hearing, Respondents stated clearly that they sought permission to destroy the tree at some point in the future, although they also stated that their plans to destroy it were not immediate. The trial judge denied the permanent injunction, stating very clearly that her ruling was based upon Respondents testimony concerning the immediacy of threatened harm, and not upon other factors (see orders). In its ruling, the Trial Court specifically avoided comment upon the D.C. statute 22-3308 (Exhibit E). At the permanent injunction hearing , Respondents also renewed a motion for partition of the tree, and the Trial Judge renewed her denial of this motion, in effect

acknowledging that Respondents do not have a legal right to destroy the tree.

Presented through counsel, Petitioner's Brief to the District of Columbia Court of Appeals referenced 29 cases and authorities and presented 3 questions for consideration: 1)Whether the trial court erred in erroneously considering "imminence" as a criteria for issuance of permanent injunctive relief 2)Whether the trial court erred in failing to consider and apply District of Columbia statutory provisions which prohibit destruction of trees belonging in whole or part to others and 3)Whether the trial court erred in failing to admit and consider evidence of the public interest when balancing the equities of injunctive relief.

Petitioner's brief raised the issue that irreparable harm was Res Judicata, yet the Trial court failed to find irreparable harm at the injunction hearing because it deemed the "risk" not to be "imminent" in spite of the statement of Respondents' counsel "We can stipulate that this case is about the right of my client on an equitable basis to remove the tree". Petitioner's brief also pointed out that Respondent was permitted to reintroduce a motion for partition although this was also Res Judicata; that Petitioner was not permitted to introduce relevant testimony; and that relevant statutes were ignored in the Court's opinion, although they had been properly introduced. Petitioner also used her brief to note on the fact that the trial court did not address D.C. statute 22-301 and glossed over the stipulation concerning Respondents dislike for Petitioner when she attempted to establish that his actions were malicious.

Respondents' filed a Motion for Summary Affirmance rather than a response to Petitioner's Appeal which, shockingly, contained new hearsay testimony including an affidavit and photographs. Their Motion was improperly granted by the court before Petitioner had an opportunity to respond, and the motion itself was improper

for a number of reasons, as discussed in the Petition for Re-hearing of Order Granting Appellees' Motion for Summary Affirmance or, in the Alternative, For Re-hearing En Banc.

These reasons included the apparent failure of the Appeals Court to consider the merits of the legal issues raised by Petitioner; as well as the apparent reliance of the Court upon Respondents' misrepresentations, new untested and irrelevant testimony, and unsupported speculation and inaccurate representations of the record.

Additional factors mentioned included Respondents' attempts to discredit Petitioner through improper, unsupported, speculative, and prejudicial allegations including entirely false statements that Petitioner sought to prevent their construction, failed to proffer evidence of the public interest, failed to present issues of law and did not provide expert testimony.

These attempts to discredit Petitioner can be disproved by the case record and Petitioner should have been given an opportunity to respond. Petitioner did proffer considerable evidence of the public interest, and she did provide expert testimony at great expense. The bulk of the court record centers on the tree simply because it was not possible for Petitioner to exhaust administrative remedies quickly enough to get protective orders to prevent harm to the foundation and structure of her building. Petitioners Brief also stated that any mention of actual or threatened structural damage caused to Petitioner's structures by Respondents' construction (which is still very much at issue) is relevant only as it negates Respondents claim that a "cloud of litigation" surrounding the Black Walnut tree decreased their property value and therefore weighed in the balance of equities.

The Respondents' motion was so laden with false, unsupported, and irrelevant content that it should have been stricken from the record.

Moreover, Petitioner noted that Respondents had still not complied with the Court's order provide Petitioner with a copy of a report reassuring the Court that the tree did not pose a danger of falling given the degree to which Respondent had cut its roots shortly after denial of the Injunction.

Respondents became increasingly brazen throughout the course of litigation. The trial record shows repeated violations of court orders, and inconsistent testimony by Respondents. Their outrageous Motion for Summary Affirmance itself demonstrates just how far they had strayed from legal ethics and the rules of the Court. It is impossible to believe that Respondents' Counsel, who has practiced law for nearly 50 years[1], was not aware that the introduction of new hearsay evidence is not permitted on appeal . It is likewise hard to believe that he does not recognize an issue of law when clearly presented.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case concerns an important federal question which has been decided by the trial court and affirmed by the D.C. Appeals Court in a way that conflicts with numerous decisions by state courts of last resort and United States Courts of Appeal; namely the erroneous reliance on imminence of harm in considering a permanent injunction. In fact, Petitioner could not find any ~~permanent~~ injunctions in any jurisdiction which had relied on imminence of harm. The implications are far-reaching as many injunctions concern public safety.

Upholding the law and the sanctity of legal

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[1]He was admitted to the bar in 1955.

procedures are important roles of the Supreme Court, as the Court of last resort. When gross disregard for the law is sanctioned by the courts, the seams of our society begin to unravel and the problem of "vigilante justice" arises. In this case, the trial judge failed to give adequate consideration to D.C. Statute.

The Appeals Court not only sanctioned this but also sanctioned Respondent's flagrant disregard for the legal rules and procedures on appeal. Had the appeals judges carefully read the briefs presented, it is incredible that they would not have noticed the obvious and ostentatious presentation of new hearsay testimony by Respondent. It is also hard to believe that they could have failed to notice the falsehood of Respodent's assertion in both of their Appeals briefs that the Petitioner had not presented legal issues.

The Trial Court failed to provide an adequate rationale for its ruling, and the Appeals Court failed to provide an rationale at all for its final ruling. This is in conflict with the presumption in other jurisdictions that the court has a duty to provide an adequate rationale for its rulings.[2]

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[2] Kuehling v. Village of Unity 265Wis.2nd939, 664 N.W. 2d 684 Wis.App., 2003. We conclude that the circuit court erroneously exercised its discretion. The circuit court did not provide an adequate rationale in its decision for the course of action it chose. STATE v. Efrain OTERO.No. 2000-187-C.A. If the Supreme Court determines that the trial justice has complied with the requisite procedure and articulated an adequate rationale for denying a motion for a new trial, that decision will be given great weight and will not be disturbed unless the trial justice overlooked or misconceived material evidence relating to a critical issue or if the justice was otherwise clearly wrong.

The rule of law is essential in a Democracy, and can only be said to exist when citizens have confidence that the law will be consistently upheld and will protect them from harm. This case is not primarily about a tree, it is about allowing ordinary citizens legal protection from being purposefully harmed by their neighbors. It is also about the duty of courts to uphold and enforce the law - essential and compelling issues crucial to the rule of law in a civilized society.

While Petitioner is representing herself pro-se, and has no legal training, it is clear to her that the District of Columbia Courts have seriously failed to provide her equal access to the law by refusing to uphold the law on her behalf, denying her both substantive and procedural due process. These Courts have refused to give her a full hearing; refused to consider evidence and legal issues properly presented and referenced; given credence to Respondents' irrelevant, misleading and improper appeals motions; and ignored Respondents' flagrant violation of Court Orders.

The fact that Judge Schwelb would have granted Petitioner a rehearing in the December 7, 2004 order, but not in the August 20, 2004 order, strongly suggests that this judge, at least, had not given due consideration to Petitioner's legal arguments earlier. As this Judge recognized the merits once attention was drawn to them, is it not a reasonable hypothesis that the other appeals judges would likewise recognize the merits of Petitioner's case, once their attention was focused on it?

The Trial Court has seriously departed from the accepted and usual course of judicial proceedings and the D.C. Appeals Court has not only sanctioned this departure; but has worsened it by sanctioning extreme irregularities by Respondents during the appeal process, the Petitioner has no recourse left but to turn to the Supreme Court as the court of last resort.

When a neighbor threatens harm to a citizen's property, the proper legal remedy is an injunction, which should not be withheld simply because the one who has threatened the harm states that he intends to cause the harm at some indefinite point in the future and in some unspecified manner. This is a compelling and important federal issue. Petitioner's counsel has quoted legal sources in his Appeal briefs, but it is plain common sense. If a violent man expressed an intention to attack a citizen or his property, it would be absurd for the Court to withhold injunctive protection just because the man had not decided on the precise timing and method of his attack. When a citizen presents laws for consideration by the courts, the citizen can not have faith in the rule of law if both trial and appeals courts refuse to consider these laws and do not articulate an adequate rationale for their decisions.

When an ordinary citizen undertakes a huge expenditure of time and money to seek justice in the Court system, when she properly follows the rules of procedure to present valid legal issues; and then discovers that the court has ruled in favor of her opponent who flagrantly ignored Court orders, flouted the proper rules of procedure, and did not address the legal issues; the citizen is left wondering whether the appeals Judges have read and considered the citizen's case, or have perhaps even been unfairly influenced through ex-parte communications or political influence. Such a legal system is at best arbitrary and ineffective, and at worst corrupt. Whether the actions of the D.C. Courts were arbitrary, negligent, or corrupt, the result is the same - the citizen has been deprived of her property, without due process of law; and has been denied the equal protection of the laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mary S. Smith
529 G Street SE
Washington, D.C. 20003
(202) 546-0189

March 7, 2005

Exhibit A

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Mary S. Smith	:	
Appellant	:	
v.	:	Consolidated Appeals
403 C Street, LLC, et al. and	:	02-CV-001428
Appellees	:	03-CV-000631
	:	

APPELLANT'S PETITION FOR RE-HEARING OF ORDER GRANTING APPELLEES' MOTION FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, FOR RE-HEARING EN BANC

NOW COMES Appellant Mary S. Smith, through undersigned counsel, and respectfully requests that this Court (a) Re-hear this Appeal before the Division pursuant to Rule 40 of the Rules of this Court; or (b) Re-hear this Appeal en banc pursuant to Rule 35 of the Rules of this Court.

In dismissing the appeal and affirming the trial court below, the Court of Appeals has overlooked or misapprehended the Appellant's arguments with respect to errors of law as more fully set forth in the Consolidated Brief on Appeal, including

but not limited to the correct application of standards for permanent injunctive relief. In the alternative, it is submitted that these same arguments and authorities support the need for Re-Hearing En Banc as establishing a legal issue of exceptional importance, *i.e.* the correct standard for issuance of permanent injunctive relief and whether or not the imminence of harm may be correctly considered in that determination.

In Support of her Petition, Appellant states as follows:

1. Appellant timely filed her Consolidated Brief on Appeal on May 25, 2004, setting forth specific and well-documented errors of law committed by the trial judge, and including detailed record citation to those errors. The errors of law included, *inter alia,* the trial court's clearly articulated reliance on the supposed lack of "imminent harm" as a basis for its decision to deny permanent injunctive relief, despite the fact that there is no such standard in the law of the District of Columbia as it applies to permanent injunctions.

2. On or about July 12. 2004, this Court granted the unopposed request of Appellees for an extension of time, until July 27, 2004, in which to file a Motion for Summary Affirmance in lieu of opposition brief. The Court initially ordered that the Appellees file their responsive brief on or before July 29, 2004.

3. Following an extension of time consented to by Appellant and granted by the Court, the Appellee's Motion for Summary Affirmance was docketed on July 29, 2004. Pursuant to Rule 27(c), the filing of this Motion suspended the briefing schedule previously set forth by the Court. It is significant that the Motion included "a separate brief supporting the Motion" despite the proscription thereof by Rule 27(a)(3)(C)(i).

4. Pursuant to the provisions of Rule 27 (c), the Motion for Summary Affirmance in the instant case stated that

it "may be treated as the brief of the party if the court denies the motion or defers consideration of the merits."

5. Rule 27(c) provides that responsive pleadings ***may*** be filed pursuant to the provisions of Rule 27(a)(4)(A), which in turn provides that the time for response may be shortened or extended by the Court. Notwithstanding this provision, Rule 27(a)(3)(C) prohibits a separate brief responding to the motion. As such, upon filing a motion in lieu of brief by Appellees, the Court had an affirmative duty to consider and rule upon the merits of the Appellant's arguments prior to ruling, which is apparently did not do. There is no provision in the Rules nor, to the best of Appellant's knowledge, under the law, which permits the Court of Appeals to consider a Motion for Summary Affirmance to be considered conceded or unopposed even in the absence of a formal opposition thereto. Replete with undocumented and uncited "factual" references to putative record evidence and supported by only conjecture and supposition as to what might have happened or might happen in the future, the Motion for Summary Affirmance cannot be relief upon by the Court of Appeals as sufficient grounds upon which to dispose of this important and comparatively straightforward case.

6. In their Motion for Summary Affirmance, the Appellees raised numerous issues of fact which Appellants believe are neither part of the record nor appropriate to disposition on appeal, but which nonetheless required additional review and record research which consumed time and resources not available in the brief time allotted for response. There would have been no prejudice to the parties or the interests of justice from a brief delay in the filing of Appellant's responsive papers.

7. Such an extension may be granted by the Court Rule 27(a)(4), for good cause, Rule 26(b); Consequently, on

August 20, 2004, Appellant respectfully requested that this Court grant a brief extension until September 10, 2004 in which to prepare and submit her opposition to the Motion/reply brief on appeal.

8. Rule 26(b) specifically contemplates the authority and propriety of granting extensions of time during which a party may respond to a motion such as that filed in the instant case. Similarly, Rule 27(b)(1)(A) acknowledges and embraces the propriety and authority to grant extensions of time when such extensions will not affect the substantive outcome of the case. Rule 27(b)(1)(B) states that such a motion may be filed "at any time." Unfortunately, Appellant's Motion for Extension was subsequently returned to Appellant's counsel (postmarked August 26, 2004) after having been rejected for filing, due to that fact that the clerk had apparently already entered the judgment affirming the decision below on the same day the Motion was served: August 20. 2004. Appellant's counsel did not learn of the dismissal of appeal, or the rejection of the Extension Motion, until he returned from a wilderness camping trip at the end of August.

9. Appellant had requested an extension of time in which to provide substantive response to the Motion and/or a pleading to be treated as a Reply Brief to the original , because, *inter alia*, purported to introduce into the. Record on Appeal certain factual matters and untested propositions of fact which were nowhere evidence nor subjected to scrutiny nor consideration by the trial court below.

10. In the instant case, the decision of the Court, issued August 20, 2004, summarily affirming the case below, is wholly without support or evidence on the record, manifestly relies upon evidence not within the record of this case, and ignores entirely the significant issues of law (including but not limited to the application by the trial court of an incorrect legal

standard as to permanent injunctions). Had this Court properly reviewed and considered the explicit assignments of error and argument in support thereof made by Appellant, it could not have summarily affirmed the judgment based upon the procedurally flawed and substantively void motion of the Appellees.

11. Significantly, the brief in support of Appellees' Motion included significant argument and reference to non-record "evidence", including a self-serving affidavit and color photograph which were wholly inappropriate for the court to accept or consider as part of the record on appeal. "Appellate review is limited to matters appearing in the record before us" *D.C. Transit System, Inc. v. Milton*, 250 A.2d 549, 550 (D.C.1969). There is simply no ability or provision in the Rules of this Court, or under any principle of justice, for Appellees to unilaterally attempt to bolster their argument with "evidence" never presented to nor considered by the trial Court. For the Court to have considered the Motion for Summary Affirmance without first striking the immaterial and impertinent heresay submission of Mr. Scallan is itself valid reason for reconsideration.

12. Appellees' Motion for Summary Affirmance is absolutely wrong in stating that "Appellant presented no witnesses at the trial, expert or otherwise. Br. 4-5. By incorporating the previous proceedings in the matter, during which Appellant presented substantial expert testimony at considerable expert and expense, the parties and the Court were all clearly of the understanding that the previous expert testimony (including substantial testimony and evidence from Mr. Zimar, which is even relied upon by Appellees at Br. 16) was incorporated by reference, and would form a part of the record for purposes of the final adjudication. *See* R ____ (Tr. 13)(referencing previous hearing's agreement to incorporate all existing testimony and exhibits).

Exhibit A

13. Similarly, the reliance in Appellees' Motion on a perceived diminution in the property's value due to the presence of the tree (or, more accurately, due to protection of the tree from destruction) is inapposite to the errors of law assigned. Br. 12-14. This argument is a "red herring" fallacy of crimson hue. The trial court did not even purport to make its determination based on relative harm, or any assessment thereof. In essence, Mr. Scallan continues to argue and support the fact that he may, at any moment, wish to remove the tree in question, free of judicial interference.[1] This points up, not diffuses, the conflict set up by the trial court in denying an injunction based on the "imminence" of threat he would actually do so.

14. Appellees also misconstrue and misstate the record with respect to the evidence of public interest proffered to the Court. Br. 15-16. Appellant sought to introduce the Urban Preservation of Forest Act not for purposes of showing it did, or would have applied to the Black Walnut in question.[2] Rather, it was introduced as public record evidence, of which the judge surely could have taken judicial note, that the preservation of mature trees on private lands is

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[1] Nor is there even facial merit in the argument that the cloud of litigation or potential injunctive limitation reduces property value in this case. If nothing else, the substantial and continuing damage to the foundation and structure of Appellant's historic building, resulting directly from unlawful excavations and negligent building techniques utilized by Appellees, will likely result in additional, independent litigation regardless of the outcome of the instant action.

[2] It should be noted that the law had not been enacted at the time of trial, and therefore was not and could not have been properly a cause of action at the time. Still, the minute amount by which Appellees' conjecture it would fail to achieve protection is itself evidence that this is the type of private litigation in which the public interest is manifest.

a subject in which the general public, as represented by its legislators, certainly does have an interest and that interest weighs in favor of protection for shared-ownership trees such as the Black Walnut.

15. Appellees' brief also asserts that the appeal is "moot" because of post-trial events, which include the entirely irrelevant and demonstrably false assertion in the putative affidavit of Mr. Scallan that "not only has the tree survived the construction, it is healthy and flourishing." Putting aside for the moment the total lack of professional qualification for the Appellees' owner to make such an assertion, it ignores entirely the import and substance of Appellant's case on appeal: The Appellees have consistently argued for and insist that they have retained and been granted by the trial court, the right to unilaterally with without further court order, remove the tree at any time and for any reason. Whether the tree lives or thrives today is irrelevant if they have the right to cut it down tomorrow. This was the entire purpose of the injunction sought, and does nothing but reinforce the trial court's error in considering imminence of harm in determining whether or not Appellant's rights as a joint owner of the tree must be preserved by court order.[3] It is nothing short of disingenuous for Appellees to argue that a tree that has survived construction despite, not because of, their actions and inactions, is somehow safe for the ages despite the direct record evidence – including Mr. Scallan's

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[3] Ironically, to the best of Appellant's knowledge, the developer Mr. Scallan, while wiling to opine directly to this court as to the health of the tree, never complied with the trial court's order that he file a report within 12 days of her May 7, 2003 order with respect to his arborist's recommended treatment for preservation of the tree's health in the face of invasive potential construction damages.

own testimony -- of the fact they view the tree as causing a diminution in the property's value and that they wish to retain the right to cut it down at any time it pleases them.

16. For all these reasons, it is respectfully submitted that the order of this Court dismissing the Appeal overlooked or misapprehended the each and every of the specific errors of law assigned in the Appellant's Consolidated Brief on Appeal, including primarily the fact that the trial judge applied an incorrect standard of law ("imminence of harm") in denying the requested permanent injunctive relief. The Motion for Summary Affirmance fails to address or refute this point, and as such it was premature for the Court to dismiss the appeal and affirm the judgment below without full consideration of the case on its merits.

It is THEREFORE REQUESTED that the Court restore this case to the calendar, resume the briefing schedule and allow the case to proceed to oral argument and adjudication on the merits, on issues as properly raised and enumerated in the Consolidated Brief of Appellant. In the alternative, it is submitted that these same arguments and authorities support the need for Re-Hearing En Banc as establishing a legal issue of exceptional importance, *i.e.* the correct standard for issuance of permanent injunctive relief and whether or not the imminence of harm may be correctly considered in that determination.

7 September 2004
Respectfully Submitted

MARY S. SMITH, Appellant

EXHIBIT B

IN THE DISTRICT OF COLUMBIA

COURT OF APPEALS

Mary S. Smith

Appellant

v. Consolidated Appeals

403 C Street, LLC, et al. 02-CV-001428 and

Appellees 03-CV-000631

On Appeal from the Superior Court of the District of Columbia
(Civil Division)

BRIEF OF APPELLANT

May 25, 2005

FOR APPELLANT
MARY SOPHIA SMITH

James M. Loots (384763)*
FORD & HARRISON LLP
1300 19th Street NW Suite 700
Washington, DC 20036
(202) 719-2000
Facsimile: (202) 719-2077
jloots@fordharrison.com

* Oral argument on behalf of Appellant will be presented by Mr. Loots

Certificate required by Rule 28(a)(1)

The undersigned counsel of record for Appellant Mary Sophia Smith certifies that the following listed parties and amici (if any) appeared below:

Mary Sophia Smith, an individual
Stanton Development Corporation
403 C Street LLC
Virginia Avenue LLC

These representations are made in order that judges of this court, inter alia, may evaluate possible disqualification or recusal.

_____

James M. Loots
Attorney of record for Mary Sophia Smith

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Other Authorities

43A C.J.S. *Injunctions* § 16 (1978) 8

Deuteronomy 20:19-20 (Revised Standard) 1

POWELL ON REAL PROPERTY § 68.111[1] [d] 6

1A Wright, Miller & Kane, Federal Practice and Procedure § 2942 (1995) 7, 8

Questions Presented

I. Whether the trial court erred in erroneously considering "imminence" as a criteria for issuance of permanent injunctive relief.

II. Whether the trial court erred in failing to consider and apply District of Columbia statutory provisions which prohibit destruction of trees belonging in whole or part to others.

III. Whether the trial court erred in failing to admit and consider evidence of the public interest when balancing the equities of injunctive relief.

I. Statement of the Case

From the earliest of times laws of society have been utilized to define the relationship between neighbors and adjoining property owners, and to determine their relative rights and responsibilities to one another and their vegetation. *See*, e.g. *Deuteronomy* 20:19-20 (Revised Standard)("When thou shalt besiege a city a long ... thou shalt not destroy the trees thereof by forcing an ax against them ").

In the present day urban environment, the importance of correctly defining and applying these intertwined and oftentimes interdependent rights and responsibilities are no less important. See, e.g. *Tanaka v. Sheehan*, 589 A.2d 391 (D.C. 1991) (permanent injunction regarding easements and gates); *Lund v. Watergate Investors Ltd. Partnership*, 728 A.2d 77, 82 (D.C. 1999)(adjoining property owner seeks permanent injunction related to parking spaces); *Prah v. Moretti*, 321 N.W. 2d 182 (Wis 1982)(adjudicating neighbor's right to sunlight for solar panels blocked by building.); see also *Miller v. St. Joseph County Area Bd. of Zoning Appeals*, ____ NE 2d ___ (Ind. App. May 24, 2004)("While the adage good fences make good neighbors is routinely heard in disputes between adjoining property owners, the phrase good trees make good neighbors better describes the facts in this case").

The instant action is about the ownership, health and integrity of a Black Walnut Tree, and more important the responsibilities of adjoining landowners to one another and to the preservation of that tree. In the forests of litigation over human and commercial interests, the preservation of a single tree -- even a majestic 50-foot Black Walnut which has silently witnessed decades of human events and towered over generations of Washingtonians -- may not initially seem

to be one of critical importance. However, as this particular intersection of personal, commercial; and public interests aptly demonstrates, the role of the courts in correctly defining, preserving, and protecting the rights of this tree – and a potential forest of future arbor vitae, shared structural walls, riparian rights or other commonly-owned interests – is an essential, time-honored, and absolutely critical function in assuring the orderly preservation and enforcement of private rights in a modern urban society.

In the instant case, that judicial role was not fulfilled. Rather, the trial judge erroneously misapplied and relied determinatively on preliminary rather than permanent injunctive criteria, declined to consider relevant and controlling District of Columbia law as to proper legal status of border trees such as the Black Walnut, and erroneously excluded from evidence and, hence, her consideration and deliberation, compelling and relevant public record evidence of the public policy implications of the case before her.

II. Procedural and Factual Background

This case involves the denial of a permanent injunction to protect a fifty-foot Black Walnut Tree located on the boundary line between Appellant's and Appellees' properties in the Capitol Hill Historic District. The Appellant, Mary Sophia Smith, initially sued the Appellees' predecessor in interest, Stanford Development Corporation, for a Temporary Restraining Order to protect both her 17 unit apartment building and trees along the property line from threatened damage arising from Appellee's construction of a 24-unit

apartment building adjoining Appellant's property.[1]

Although Appellant initially sued to protect a number of trees along the boundary line and to require Appellees to conform their construction to certain regulatory safety standards and code requirements; the issue remaining at the final injunction hearing was a single Black Walnut tree sited squarely on the border between the two properties , which the Appellees had repeatedly threatened to destroy in the course of their development of the apartment building. [2]

A. Previous Findings and Interim Orders of the Court

From the earliest proceedings in this case, (including a Consent Temporary Restraining Order signed in the Chambers of the Duty Judge (R_____ ;

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[1]Early in the litigation, 403 C Street LLC and Virginia Ave LLC, *et al.* were substituted as defendant parties at the request of defendants. At all relevant times Mr. J Andrew Scallan asserted himself as "beneficial owner of the property and all actions of which the Plaintiff complains have been taken by me or on my behalf." (R____; Scallan Aff. 9/19/01).

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[2] Any mention in these proceedings of actual or threatened structural damage caused to Appellant's structures by Appellees' construction (which is still very much at issue but not a part of these proceedings) is relevant only as it pertains to Appellees claim that a "cloud of litigation" surrounding the Black Walnut tree decreased their property value and therefore weighed in the balance of equities.

Order dated 8/31/01)[3], the record is replete with findings that irreparable harm would be caused in the event Appellees cut the trees along the property line and restrained Appellees from taking any action which would affect vegetation on Appellant's property. Construction work unrelated to the trees was also enjoined. A subsequent Consent Temporary Restraining Order (R_____, Order dated 10/4/01)) reiterated the finding of irreparable harm and restrained Appellees from cutting or harming the trees.

On November 1, 2001 in open court, the parties agreed to a Consent Preliminary Injunction to be crafted jointly in consultation with the parties' respective arborists (R_____; Order dated 12/2/01). The Consent Preliminary Injunction (R_____, Order dated 11/15/01 *nunc pro tunc* 11/1/01)) again set forth the finding of irreparable harm should the Black Walnut Tree be cut, and enjoined actions harmful to the tree. That Order also enjoined any action within a ten foot arc from the

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[3]As of the filing of this Brief, the Court of Appeals record citations remained unavailable to Appellant, and there remains significant question as to the completeness and content of the record on appeal, particularly since the advent of this Court's revised rules with respect to designation of record on appeal. Upon clarification and resolution of these issues, and presentation or organization of a complete appeal record as it will be available for reference by the Court, Appellant proposes to supplement this Brief with record entry citations referring to the actual record on appeal, whatever that is finally determined to include and in whatever order it is presented. In the interim, record citations are identified by their date and nature, transcript page where applicable, and the blank reference "R_____."

trunk of the Black Walnut Tree and required that no actions be taken outside that arc until a clean cut of the roots was accomplished using specific techniques described in the order. *Id.*

A subsequent interim order (R____; Order dated 12/28/01) denied injunctive protection regarding construction procedures until administrative remedies had been exhausted, granted Appellees counterclaim for nuisance to remove two deteriorating Locust trees, and denied a Preliminary Injunction to protect a hackberry tree along the property line which the judge found small enough to be practically replaceable. *Id.* This Order also reaffirmed the injunctive protection of the Black Walnut Tree and again clearly reiterated the finding of irreparable harm: "The Court finds that the loss of shade and aesthetics from this tree would constitute irreparable harm to Plaintiff." *Id.*

An amended complaint was filed on April 3, 2002 to address Ms. Smith's continued concerns about the affect of construction methods on her property and her concern that Appellees had excavated an area around the Black Walnut Tree which Appellees previously stated would not be excavated. R _____. Defendant's construction was rapidly proceeding around the Black Walnut Tree while the motion was pending and Appellant requested and received additional Temporary Restraining Orders to prevent threatened harm (R_____, Order Dated 09/13/02; R_____; Order Dated 09/24/02).

On September 27, 2002, the trial court held a Show Cause hearing with respect to the Appellees' compliance with existing interim orders of the Court. R _____. At the Show Cause hearing, Appellant presented an Architect expert who introduced a mark-up of construction drawings on file (R_____; Plaintiff Exhibit 1 from 9/27/02 hearing) which, indicated an intention to

excavate the area surrounding the tree. Appellant's arborist expert witness testified that the care of the tree during construction had been substandard and if this care continued it would likely kill the tree. Further, he stated that repeated cutting of the roots and erosion around the edges of exposed roots was harmful and that cutting the roots within a few feet of the tree would certainly kill it. R_____(testimony of Edward Milhaus, 09/27/02).

The trial court subsequently ordered that Defendants not take any actions which would harm the tree, that they water and mulch the tree, and that they install flexible pavers under the supervision of their arborist. (R____; Order dated 10/11/02; R _____ Order dated 11/6/02).

At the November 20, 2002 trial on the merits wherein Appellant sought a permanent injunction, the trial judge denied the Appellant's prayer for relief protecting the sole remaining boundary line tree (R____; TR-B at 6)[4]. Appellees were permitted to reintroduce their motion for partition of the tree and the trial court reaffirmed the denial of that motion (R____; TR-B at 4). Notwithstanding previous representations of Appellees and orders of the court to the effect that Appellees intended to take steps to preserve the tree, Appellees' attorney stated unequivocally that his understanding of the case was that it concerned the right of Appellees to cut down the Black Walnut tree (R____;TR-B at 6). Mr Scallan testified that he was not

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[4] The transcription of that hearing is bifurcated into two volumes, with evidence and testimony in one set, referred to herein as TR-A, and the court's ruling (which was part of a continuous proceeding) on a second transcript with new pagination, referred to herein as TR-B.

sure what use he might make of the few remaining feet of land which contained roots of the tree, but he would like judicial permission to remove the tree at some point in the future, and he named specific examples of other uses which required removal of the tree. (R____; TR-A at 65-66).

B. The Tree is owned as Tenants in Common by Appellees and Appellants

There has never been any dispute in this case that the Black Walnut Tree belongs jointly to Appellant and Appellees. Trees growing on boundary lines between landowners leads to a tenancy in common as to those trees. See POWELL ON REAL PROPERTY § 68.11 [l] [b] and [c] (natural seedlings growing on a boundary line, plantings on the boundary line, and plantings near the boundary line pursuant to agreement all lead to tenancy in common). The common ownership of the Black Walnut, which it is undisputed is growing through the middle of the joint property line of Appellant and Appellees, is not in dispute.

Nor is there any issue that injunctive relief is appropriate to preserve trees growing across property borders. POWELL ON REAL PROPERTY § 68.111[1] [d] "An abutting owner who threatens to do material injury to a boundary plant can be enjoined." See *Scarborough v. Woodill* 7 Cal App 39, 93 P 383 (1907) (Defendant was enjoined from cutting or injuring cypress trees on a boundary line); *Ridge v. Blaha,* 520 N.E. 2d 980 (Ill. 1988)(injunction restraining Defendant from destroying a property line tree); *Weisel v Hobbs* 294 NW 448 (Neb. 940)(injunction protecting a large ornamental shade tree on property line from destruction); *Patterson v. Oye,* 333 N. W. 2d 389 (Neb 1983) (injunction against removing boundary line hedges and bushes); *Jurgens v. Wiese*, 38 NW 2d 261 (Neb 1949) (injunction to prevent

destruction of hedge of adjoining landowners).

What this common ownership of the tree means to the rights of the parties to preserve or destroy that tree, however, was very much in dispute at trial. Appellant contends that her interests should have been preserved, and that the threat of destruction of the commonly-owned tree should be enjoined. *See, Kimber v. Burns*, 97 N.E. 671 (Ill. 1912) (tree was 8 inches on Plaintiff's lot and 22 inches on defendant's lot, yet the court held that the Defendant wrongfully removed the tree).

Argument

III. The Trial Judge Erred in Identifying and Applying the Proper Standard for Permanent Injunctive Relief.

A. The Appropriate Tests for Permanent Injunctive Relief in the District of Columbia

Injunctive relief is committed to the sound discretion of the trial court, and the Court of Appeals will not disturb the denial of either preliminary or permanent injunctive relief absent an abuse of discretion. *In re Antioch Univ.*, 418 A.2d 105, 109 (D.C.1980); *Wagner v. Taylor*, 266 U.S.App.D.C. 402, 411-12, 836 F.2d 566, 575-76 (1987); *National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 186 U.S.App.D.C. 331, 363, 569 F.2d 570, 602 (1976), *vacated in part on other grounds sub. nom., United States Postal Serv. v. Associated Third Class Mail Users*, 434 U.S. 884, 98 S.Ct. 253, 54 L.Ed.2d 169 (1977); *see also* 11A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2942 (1995).

However, this Court has also made it clear that there are two entirely distinct and independent sets of criteria to be applied by the trial court when utilizing that discretion to grant or deny requested injunctive relief.

With respect to temporary injunctive relief, this Court has held:

> In determining whether a preliminary injunction is appropriate, the trial court must take into consideration four factors: "(1) likelihood of irreparable harm in the absence of a preliminary injunction; (2) likelihood of success on the merits in the underlying cause of action; (3) [whether] the "balance of injuries" favors granting an injunction; and (4) [whether] the public interest would be served by granting the injunctive relief sought." *Antioch, supra,* 418 A.2d at 109.

Hill v. District of Columbia, 665 A.2d 185, 187-188 (D.C. 1995). By contrast, the standards for *permanent* injunctive relief, of the sort requested in the instant case, were summarized as follows:

> A permanent injunction, however, requires the trial court to find that "there is no adequate remedy at law, ... the balance of equities favors the moving party, and ... success on the merits has been demonstrated." 43A C.J.S. *Injunctions* § 16 (1978); *Universal Shipping Co. v. United States,* 652 F.Supp. 668, 675-76 (D.D.C.1987) (holding that the "[c]ourt must look at the interests of the parties who might be affected by the [injunction] and must also examine whether the facts and the relevant law indicate that an injunction clearly should be granted or denied apart from any countervailing interest").

Id., 665 A.2d at 188.

B. The Trial Court Erred in considering the Imminence of Harm in its Decision

As noted above, the trial court ruled from the bench denying Appellant's request for a permanent injunction preventing damage or destruction of the shared Black Walnut Tree by Defendants. R_____; TR-B at 1-12 In her words: "There is no permanent injunction. There is no injunction at all." R _____; TR-B at 11-12. It is clear from the transcript of

her decision, however, that the determinative factor which led her to deny Appellant's request for injunction was her perception that the Appellant had failed to establish any imminence of harm to the tree. However, as set forth above, the imminence or lack thereof is a criteria which ought be applied only in the case of temporary injunctive relief, not permanent.

According to the trial court, her decision was made because:

> There's been a whole lot of testimony in this case about what Mr. Scallon attempted to do in the past. Well, the building, as I can see it is almost up. I asked him about the kinds of uses he might make of this three foot strip between the outer edge of the stairs and the tree itself. And he gave me a number of uses that he could make of it. But he has not so far as I can see made any determination about what he is going to do. Not knowing that he has any specific plans for doing anything that he might do with this tree ***I cannot make a finding that you stand to suffer some kind of immediate or irreparable harm by whatever he chooses to do***

R _____; TR-B at 5 (emphasis supplied). The court continued:

> If he puts a bench there on that three-foot strip, that's not going to harm the property. And I can't say that he intends to excavate or lay cement there, I think a danger - a fear that you had expressed. I don't know what he is going to do with it. So I am not going to speculate that anything that he might do is something that is going to harm this tree.
>
> Obviously, he doesn't like the tree there. Does that mean that he's going to go out and do something that is going to harm the tree? I don't know. And because I don't know, ***I cannot find that there is either an***

imminent or an irreparable risk to harm the tree.

> [. . .]
> Now, I (have) no doubt that he wishes the tree wasn't there but, I've not heard him say he's going to cut it down if I don't give him permission to. And I can't make the finding that you're requesting that – so, I'm denying both of you the relief that you requested.

R _____; TR-B at 5-6 (emphasis supplied)[5]. Again, in commenting on the justification for her decision, the trial judge emphasized that "the main focus -- the main inquiry that I have to make in determining whether or not to grant a permanent injunction is whether you stand to suffer, ***where there's an imminent risk [of] irreparable harm***, then I can't find that." (R____; TR-B 4-5)(emphasis supplied)

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[5] This latter finding of the court was also directly contrary to sworn testimony and representations made by Appellees that very same afternoon of the trial. If the trial judge didn't hear "him say he's going to cut it down," she certainly heard Appellees represent: "We can stipulate that this case is about the right of my client on an equitable basis to remove the tree. And it is the [Plaintiff]'s position that the removal of the tree will cause her irreparable harm. Our position is, is that it will not cause her irreparable harm and therefore, she's not entitled to an injunction, but she is entitled to an equitable resolution of this matter. " R____; TR-B at 6-7. Clearly, the Appellees expressed their intention to remove the tree in one manner or another: "This tree is owned by them as tenants in common...and the tree can be partitioned, or the Court can absent a petition, order an equitable resolution, which would be along the same lines as a partition." R____; TR-B at XX.

In grafting the additional requirement of "imminent" or irreparable "risk" of the tree's destruction, as opposed to correctly applying the standards for permanent injunctive relief, the trial court precluded Appellant's request for otherwise justified relief.

As a matter of law, this error in application of the judicial standards for determining application for permanent injunctive relief mandates reversal and remand of the judge's denial of Appellant's requested relief.

C. The remaining criteria for issuance of a Permanent Injunction were Satisfied

Having erroneously concluded that the perceived lack of imminent harm precluded granting permanent injunction, the trial court stopped short of making specific findings as to the presence or absence of other factors required for a permanent injunction. However, examination of the trial court's previous rulings, factual findings, and the evidence of the case clearly indicates that the remaining factors were present and justified the relief sought.

As demonstrated by the repeated factual determinations of the court in its interim orders with respect to temporary injunctive relief, as well as caselaw set forth above, there was and is no adequate remedy at law for the destruction of a jointly-owned tree.[6] The value of ornamental, landscaping or shade trees on private land is considered to include aesthetic value to the owner and injunctions have been granted because the owner can not be made whole by money. Courts elsewhere have

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[6] *See. e.g.*, the first temporary restraining Order entered by the Court in the instant case, on August 22, 2001, R _____, which specifically found and held "the Plaintiff... will suffer irreparable harm in the event that the Defendant ... cuts the trees ... along the property line between the Plaintiff's property and the Defendants' property."

embraced this concept as well. In *Linebarger v. Owenby*, 83 S.W.3d 435 (Ark. 2003) the Court of Appeals of Arkansas commented that when ornamental, screening or shade trees are injured, "the use of the land should be considered and the owner should be compensated by damages representing the replacement cost of the trees.". See also *Fleece v. Kankey*, 72 S.W. 3d 879 (Ark. 2002).

As noted *infra*, the trial court failed to consider the public interest in its decision, but in hearing evidence and commenting upon the relative harm and equities to the parties, the court similarly ignored the evidence before it and summarily excluded any reference to either side's position or evidence on the issue in its ruling. Finally, as to success on the merits, the implicit conclusion of the court in its ruling was that but for the lack of imminent harm the Appellant would prevail. While it may be difficult to supply the missing pieces of the trial court's though process and logic, the absence of analysis or discussion as to this issue itself commands a remand for further consideration consistent with the legal criteria.

In sum, the application of an erroneous standard and criteria which the trial court deemed fatal to Appellant's claims for relief is a clear error of law mandating reversal.

IV. The Trial Court Erred in Not Addressing or Applying Controlling Statutory Authority

In refusing to issue the permanent injunction requested by Appellant, the trial judge completely failed to address or apply controlling District of Columbia laws which forbid destruction of trees attached to the land of another and the destruction of boundary trees. This is independent and sufficient error to reverse the trial judge's denial as a matter of law.

District of Columbia code provisions were cited to the trial court as having direct bearing on whether or not the Appellees ought be enjoined from destroying or damaging the

Black Walnut Tree:

> D.C. Code 22-3308. Cutting down or destroying things growing on or attached to the land of another. Removal of tree belonging to another: Whoever maliciously cuts down or destroys .. any standing or growing vine, bush, sapling, or tree on the land of another, or severs from the land of another any product standing or growing thereon, or any other thing attached thereto, shall, if the value of the thing destroyed, or the amount of damage done to any such thing or to the land is $50 or more, be imprisoned for not less than 180 days.

It was alleged by Appellant, and evidence was introduced at trial, to establish that the intention of Appellees to remove the Black Walnut tree was, in fact, within the legal definition of "malicious."

For purposes of this analysis, "malice" does not require any evil intent or animosity. "All that is required is a conscious disregard of a known and substantial risk of the harm which the statute is intended to prevent. *Charles v. United States,* 371 A.2d 404, 411 (D.C.1977) (citation omitted). Although malice may be inferred from intentional wrongdoing, *Paige v. United States,* 183 A.2d 759 (D.C.1962), the only intent required to be proven is the intent to do the act which results in the injury--in other words, a general intent." *Carter v. U.S.*, 531 A.2d 956, 962 (D.C. 1987) [7]

There can be no question that Appellees' threatened act complained of here – destruction of the tree belonging in part to

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[7] See also *Laughlin v. Bon Air Hotel*, 68 S.E. 186,189, 85 Ga. App. 43 ("'malicious' or `maliciously' means any unauthorized interference or any interference without legal justification or excuse, and personal ill will or animosity is not essential).

another -- was intentional in nature. There is simply no requirement that the Appellees have an "intention to injure or destroy the property or some other bad or evil purpose, [which] would require a finding of specific intent, which is not an element of malicious destruction of property." *Id.* [8]

In the instant case, it was indisputable that the Black Walnut tree was on the border between the lots and therefore was also property of and growing on the land of Appellant, as the Code requires.

There is ample authority for the issuance of permanent injunctive relief in a private action to restrain unlawful behavior prescribed by statute. See, e.g.,*Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 114 S.Ct. 2516 (1994).

Appellant considers the Appellee's repeated and consistent threatened taking of her Black Walnut tree to be self-evident threat of violation of D.C. Code Section 22-3308. But regardless of whether or not the trial court ultimately determined the behavior which was threatened by Appellees to have been a threat to violate this statutory prohibition, the trial court

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[8] Even if the mindset of Appellees were an issue, there was no factual issue as to the animosity felt by Appellees towards Appellant:

BY MS SMITH:
Q. Mr. Scallan, it's true that you don't like me isn't it?
A. Yes.
Mr. Reed: Your Honor, I don't know that that's relevant, There's not a whole lot of love lost between these two people; we all know that.
THE COURT: All right, It's a relevant comment–
Mr. REED: We'll Stipulate.

R ____; TR-A at 73.

nonetheless owed a duty under the law to consider and either apply or reject the provisions of this statute to the facts at bar. By failing to even consider the implications and applicability of a statutory provision which on its face absolutely prohibits the very conduct Appellant sought to enjoin, the trial judge committed an error of law which must be rectified.

V. The Trial Judge Erred in Refusing to Admit Evidence of the Public Interest in Granting the Requested Injunction.

As noted above, one of the equities to be considered by the trial court in balancing the interests of the parties is that of the impact on the public interest. In determining whether to enter a permanent injunction, the Court considers a modified iteration of the factors it utilizes in assessing preliminary injunctions: (1) success on the merits, (2) whether the plaintiffs will suffer irreparable injury absent an injunction, (3) whether, balancing the hardships, there is harm to defendants or other interested parties, and (4) whether the public interest favors granting the injunction. *See National Ass'n of Psychiatric Health Systems, et al. v. Shalala,* 120 F.Supp.2d 33, 44 (D.D.C.2000). *See also Amoco Production Co. v. Village of Gambell,* 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

In the instant case, Appellant attempted at trial to introduce compelling evidence of the public interest, as expressed by the District of Columbia legislature and amply documented in the public record, in preserving and maintaining trees on private property in the District. *See* Urban Forest Preservation Act of 2003, D.C. Law 14-309, codified at D.C. Code § 8-651.01 *et seq.* The trial court erred in refusing to accept into evidence, or even take judicial note of, this public interest as it relates to the question of whether the Black Walnut tree ought have been preserved.

Appellant had proffered to the trial judge the existence and legislative history of the Urban Forest Preservation Act as evidence of the fact that in the urban environment of the District

of Columbia, trees are an increasingly threatened and publicly valuable portion of the ecosystem. Quite apart from the aesthetic of whether one person's tree is considered attractive or "useful" by another, the District of Columbia council has found:

> (a) The urban forest of the District of Columbia, growing on both public and private land, is one of the District's great natural resources.
>
> (b) A healthy, vibrant urban forest provides numerous environmental benefits, including:
>
> (1) Heat island effect mitigation and reduced energy use;
>
> (2) Better air quality and reduced water pollution; and
>
> (3) Quieter and more beautiful neighborhoods.
>
> (c) The trees comprising the urban forest have significant aesthetic value, which enhances property values and the quality of life in neighborhoods throughout the District.

DC Code § 8-651.01. However, the trial court refused to consider this expression of public interest in its deliberations. R____; TR-A at 1-15.

The value of private trees is also reflected in other state legislation. The statutes of 26 states provide for treble damages[9] , four states provide for double damages[10], and 16

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[9] Alaska Stat. Ann. $_{55}$ 09.45.730; Ark. Code Ann. § 18-60-102; Cal. Civ. Code § 3346; Conn. Gen. Stat. Ann. § 52-560; Del. Code Ann. Tit. § 25-1401; Idaho Code Ann. § 6-202; 740111. Comp Stat. §18512; Iowa Code Ann. § 658.4; Ky, Rev. Stat § 364.130; La. Rev. Stat Ann. § 3:4278.1 ;

states have statutes imposing jail sentences or fines for destroying or damaging a tree[11] Clearly, the legislatures of this and other jurisdictions have repeatedly manifest the public interest in a policy which preserves trees against threatened removal in situations such as this.

Me.Rev. Stat. Ann. 14, 7552 ; Md. Code Ann. § 5-409 ; Minn Stan. Ann. § 561.04 ; Mo. Stat. Ann. § 537.340 ; Mont. Code Ann. 70-16-108; Nev Rev. Stat. § 40.160; NY Real Prop Acts Law § 861 ; ND Cent. Code. Ann. § 32-03-30; Ohio Rev. Code Ann. § 901.51; Okla. Stat. Ann. Tit. 23 § 72; Or. Rev. Stat. § 105.810; S. D. Codified Laws Ann. § 21-3-10; Utah Code Ann. 7 § 8-38-3; Vt. Stat. Ann. tit. 13 § 3606; Wash Rev. Code Ann. 64.12.030; W. Va. Code Ann. § 61-3-48a

[10] Miss Code Ann. § 95-5-10; 18 Pa. Cons. Stat. § 1107 ; R.I. Gen Laws § 34-20-1 ; Wis. Stat. Ann. 26.09

[11] Ala. Code Ann. § 35-14-1 ; Cal. Penal Code §384a; D. C. Code Ann. § 22-3108 ; Idaho Code Ann. § /87021 Mass. Gen. Laws Ann. Ch. 266 §§ 113,114; Mich. Comp. Laws Ann § 750.382; N.J. Stat. Ann. 2C:18-5 ; N. M. Stat. Ann. § § 68-2-17, 22 to 23; N. C. Gen. Stat. § 14-128; Ohio Rev. Code Ann. § 901.9 Okla. Stat. Ann. Tit. 21, § 1768; Or. Rev. Stat. § 527.260; R.I. Gen. Laws § 11-44-2; S. C. Codified Laws 16-11-520; Va. Code Ann. § 18-2-140; Wis. Stat. Ann § 26.05

The trial judge failed to consider or even admit evidence of these important public interest criteria. Instead, the trial judge incorrectly limited her consideration of the equities to the respective views of Appellant and Appellee as to whether the border shared tree in question was a good or bad thing for their respective properties.[12] R _____; TR-A at 4-5. Nor was there any evaluation or comment upon the public interest in the trial judge's deliberation and determination of this case.

This exclusion of otherwise competent and admissible evidence and failure to consider the public interest which courts have repeatedly held ought be considered in the weighing of equities amounts to prejudicial and reversible error on the part of the trial judge.

VI. Conclusion.

For all the above reasons, the trial court erred in refusing to grant the permanent injunctive relief requested by Plaintiff below. It is the manifest responsibility of this Court to correct that error by reversing and remanding the final decision of the trial court for further proceedings consistent with the correct standards and undisputed evidence, and to ensure that the Black Walnut Tree will be allowed to live out its natural life without threat of destruction or fatal disruption of its life systems by Defendants.

Respectfully Submitted
May 25, 2004
FOR APPELLANT
MARY SOPHIA SMITH

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[12] There was certainly no factual disagreement when the judge stated: "Obviously [Appellee] doesn't like the tree there." R _____; TR-A at 5-6.

EXHIBIT C

District of Columbia
Court of Appeals

NOS. 02-cv-1428 and 03-CV-631

MARY S. SMITH
Appellant,

Filed Aug 20 2004

CA6295-01

V.
403 C STREET, NE. L.L.C, ET AL..,
Appellees.

BEFORE: Schwelb and Washington, Associate Judges, and Newman, Senior Judge.

ORDER

On consideration of appellees' motion for summary affirmance, to which no response has been filed, appellant's brief and a review of the record on appeal, it is

ORDERED that appellees' motion for summary affirmance is granted. It is

FURTHER ORDERED and ADJUDGED that the orders on appeal are hereby affirmed.

FOR THE COURT
JOY A. CHAPPER
Acting Clerk of the Court

EXHIBIT D

District of Columbia
Court of Appeals

NOS. 02-cv-1428 and 03-CV-631

MARY S. SMITH
Appellant

Filed Dec 6 2004

CA6295-01

V.

403 C STREET, NE.
LLC, ET AL..,
Appellees

BEFORE: Wagner, Chief Judge; Terry, *Schwelb. Farrell, Ruiz, Reid, Glickman, and *Washington, Associate Judges; *Newman, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, and the opposition thereto, it is

Ordered by the merits division* that the petition for rehearing is denied; and it appearing that no Judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

*Associate Judge Schwelb would grant rehearing

EXHIBIT E

D.C. Code 22-3308. Cutting down or destroying things growing on or attached to the land of another. Removal of tree belonging to another: Whoever maliciously cuts down or destroys ... any standing or growing vine, bush, sapling, or tree on the land of another, or severs from the land of another any product standing or growing thereon, or any other thing attached thereto, shall, if the value of the thing destroyed, or the amount of damage done to any such thing or to the land is $50 or more, be imprisoned for not less than 180 days.

Evidence of Malice

Q. Mr. Scallan, it's true that you don't like me isn't it?
A. Yes.
Mr. Reed: Your Honor, I don't know that that's relevant. There's not a whole lot of love lost between these two people; we all know that.
THE COURT: All right, It's a relevant comment–
Mr. REED: We'll Stipulate.

EXHIBIT F

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MARY SOPHIA SMITH
529 G Street, S.E.
Washington, D.C. 20003
Plaintiff,

Civil Action No. 0 I ca006295
Calendar 12

STANTON DEVELOPMENT CORPORATION
660 Pennsylvania Avenue, S.E., Suite 203
Washington, D.C. 20003
Defendant.

CONSENT TEMPORARY RESTRAINING ORDER

This matter having come on to be heard on August 22, 2001, on the Plaintiff's Emergency Motion for Temporary Restraining Order, and the Court having been advised that the parties hereby consent to the issuance of the following Order, and the Court being otherwise duly advised in the premises, the Plaintiff's Motion is hereby GRANTED; and it is this 22nd day of August, 2001,

ORDERED, that the Plaintiff, Mary Sophia Smith, will suffer irreparable harm in the event that the Defendant, Stanton Development Corporation, cuts the trees on the Plaintiff's real property located at 529 G Street, S.E., in the City of Washington, District of Columbia, and along the property line between the Plaintiffs property and the Defendant's property located at 525 G Street, S.E., in the City of Washington, District of Columbia; and it is

FURTHER ORDERED, that the Court hereby temporarily restrains and enjoins the Defendant, Stanton Development Corporation, its officers, directors, employees,

agents, successors, assigns and contractors from:

(1) touching, cutting, trimming, pruning, molesting, removing or from taking any action which in any way affects the trees or other vegetation located on the parcel of real property owned by the Plaintiff and located at 529 G Street, S.E., in the City of Washington ("Real Property") or along the property line between the Plaintiffs property and the Defendant's property located at 525 G Street, S.E., in the City of Washington, District of Columbia;

(2) from taking any action which would damage the Plaintiff s building located on the Plaintiff s Real Property; and

(3)from taking any action pursuant to any permit issued by the District of Columbia government related to the parcels of real property owned by the Defendant which abuts the Plaintiffs Real Property pending the resolution of Plaintiffs administrative challenge thereto.

This Temporary Restraining Order shall be valid. until the status hearing before Judge Reid-Winston, Calendar 12, on the 7th day of September 2001, at 10:00 a.m. and shall expire by its terms.

DONE AND ORDERED in Chambers at Washington, D.C. on August 22,2001, at 2:25 p.m.

Bruce D. Beaudin
JUDGE

EXHIBIT G

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MARY SOPHIA SMITH,
Plaintiff/Counter- Defendant

Civil Action. No. 01ca006295
Calendar 12
Judge Reid-Winston

v.

VIRGINIA AVENUE, LLC and
403 C STREET, LLC et al
Defendants/Counter-Plaintiffs

CONSENT PRELIMINARY INJUNCTION

This matter, having come on to be heard on November 1, 2001, and the Court, having been advised that the parties hereby consent to the issuance of the following Order, and the Court being otherwise duly advised in the premises, the Plaintiffs' Motion is hereby GRANTED and it is this 15th day of November, 2001,

ORDERED, that the Court hereby determines that Plaintiff, Mary Sophia Smith, will suffer irreparable hann in the event that the Defendants, Virginia Avenue LLC and 403 C Street, LLC, cut the Black Walnut tree on the boundary line between the Plaintiff's real property located at 529 G Street, Southeast, in the City of Washington, District of Columbia, and Defendants' property located at 525 G Street, Southeast, in the
City of Washington, District of Columbia; that failure to grant a temporary restrainingorder will cause more harm to the Plaintiff than will be caused to the Defendant by

itsissuance; that that the Plaintiff is likely to prevail on the merits and that the public interestwill not be disserved by its issuance.

It is therefore **FURTHER ORDERED** that the Defendants, its officers, directors, employees, agents, successors, assigns and contractors are hereby preliminarily enjoined from:

1. touching, cutting, trimming, pruning, molesting, removing or from taking any action which in anyway affects the Black Walnut tree on the boundary line between the Plaintiff's real property located at 529 G Street, Southeast, in the City of Washington, District of Columbia, and Defendants' propelty located at 525 G Street, Southeast, in the City of Washington, District of Columbia;
2. from taking any action within the area inside a ten foot arc from the trunk of the Black Walnut tree on the boundary line between the Plaintiff's real property located at 529 G Street, Southeast, in the City of Washington, District of Columbia, and Defendants' property located at 525 G Street, Southeast, in the City of Washington, District of Columbia; and
3. from taking any action in the area outside a ten foot arc from the trunkof the Black Walnut tree on the boundary line between the Plaintiff's real property located at 529 G Street, Southeast, in the City of Washington, District of Columbia, and Defendants' property located at 525 G Street, Southeast, in the City of Washington, District of Columbia which would affect the roots of the Black Walnut tree without first conducting the following actions to prevent harm to the critical roots of the Black Walnut tree:
   a. The Defendants shall conduct root pruning

along the limits of clearing and grading prior to any other site disturbance, including installation of siltation control measures.

b. The defendants shall root prune wherever grades will be altered within the root zone of the Black Walnut tree and shall use a trencher, vibratory plow, or stump grinder to root prune to a depth of 18 inches. Immediately after root pruning, the Defendants shall backfill the trench with mulch containing wood chips, compost or pine bark mulch to a depth of four inches and the Defendants shall not place any material against the Black Walnut tree's stem.

This Preliminary Injunction shall be valid until such time as a final judgment is ssued by this Court on the Plaintiff/Counter-Defendant and the Defendants/Counter-Plaintiffs' claims or following further order of this Court.

DONE AND ORDERED at Washington, D.C. on November 15, 2001, at 5:00 p.m. nunc pro tunc tunc November 1, 2001.

Rhonda Reid Winston
SUPERIOR COURT JUDGE
Signed in Chambers

EXHIBIT H :

JACKET ENTRY:

12/28/02 ORDER GRANTING & DENYING IN PART MOTION FOR PRELIMINARY INJUNCTION

Further Ordered as follows with respect to the trees on the boundary line between the parties properties: that the motion be denied as to the two locust trees; that the motion be denied as to the hackberry tree; that with respect to the Black Walnut Tree, the motion be granted and the court with respect to any actions defendants might take pursuant to any permit issued by the district of Columbia government the motion be denied.

EXHIBIT I :

ORDER OF COURT DENYING BOTH INJUNCTION AND PARTITION

JACKET ENTRY:
(no written order exists)

11/30/02 Case called for trial. Hearing on permanent injunction. Parties present…Closing argument heard on behalf of both sides. Oral findings of fact/conclusions of law heard and indicated on the record. Plaintiff's request for permanent injunction and defendants' request for a partition are denied.

TRANSCRIPT EXCERPTS SHOWING IMMEDIACY OF HARM AS RATIONALE:

THE COURT: the main focus -- the main inquiry that I have to make in determining whether or not to grant a permanent injunction is whether you stand to suffer, where there's an imminent risk to irreparable harm, then I can't find that.

There's been a whole lot of testimony in this case about what Mr. Scallon attempted to do in the past. Well, the building, as I can see it, is almost up. I asked him about the kinds of uses he might make of this three-foot strip between the outer edge of the stairs and the tree itself. And he gave me a number of uses that he could make of it.

But he has not so far as I can see made any determination about what he is going to do. Not knowing that he has any specific plans for doing anything that he might do with this tree I cannot make a finding that you stand to suffer some sort of immediate or irreparable harm by whatever he

chooses to do.

If he puts a bench there on that three-foot strip, that's not going to harm the property. And I can't say that he intends to excavate more or lay cement there, I think a danger - a fear that you had expressed. I don't know what he is going to do with it. So I am not going to speculate that anything that he might do is something that is going to harm this tree.

Obviously, he doesn't like the tree there. Does that mean that he's going to go out and do something that is going to harm the tree? I don't know. And because I don't know, I cannot find that there is either an imminent or an irreparable risk to harm that tree....

UNIDENTIFIED SPEAKER: Can I ask two things, one for a point of clarification?
Are you permitting him to cut into the trunk of the tree?

THE COURT: I haven't said a word about the trunk of the tree. I don't have any indication that that's what he's going to do and therefore I'm not precluding him from doing it. I'm not saying anything about whether he can or can't. I'm saying that any part of that tree that causes some harm to his property or exposes him to liability, he can take care of and address the potential harm.

UNIDENTIFIED SPEAKER: Okay. I would also ask, are you ruling on my request for a stay pending an emergency appeal?

THE COURT: There's nothing to stay. I haven't done anything.
I have not granted an order. So there's no order to stay.
...

THE COURT: There is no permanent injunction. There is

no injunction at all.

...

THE COURT: The jacket entry should reflect that the permanent injunction request has been denied.

The preliminary injunction has been dissolved and that the partition claim, to the extent that it's expert, is denied.

EXHIBIT J

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MARY SOPHIA SMITH FILED May 8 2003
Plaintiff and
Counterdefendant,

Civil Action No. 0 I ca006295
Calendar 12- Judge Reid Winston

403 C Street,NE, et al.,
Defendants and Counterplaintiffs

ORDER

Upon consideration of Plaintiff's Motion for Temporary Restraining Order Pending Appeal (captioned " Renewed Motion for Temporary Restraining Order, Response to Defendant's Response to Plaintiff's Motion for Stay, and Declaration"), the Defendants' opposition thereto, the testimony and exhibits introduced by the parties at the hearing held by the Court thereon on May 6, 2003, it is by the Court this 7th day of May, 2003,

ORDERED, that Plaintiff's , Motion for Temporary Restraining Order Pending Appeal be and it is hereby GRANTED in part and DENIED in part and Defendants are ordered as follows:

1. That within ten (10) days commencing with the date of this Order, they consult with an arborist about the construction of a wall around the exposed roots at the base of the black walnut tree or the installation of such other or alternative treatment around said roots as such arborist may recommend;

2. That Defendants not excavate nor engage in any further root pruning or cutting closer to the trunk of the tree than as presently exists without the prior permission of the Court;

3. That within ten (10) days if not otherwise filled by the installation of the wall or other treatment ordered above, that the trench adjacent to all exposed roots of the tree be filled with a substance that will not injure the roots of the tree; and

4. That Defendants submit a report to the Court within twelve (12) days of the date of this Order describing fully the work performed by Defendants as ordered herein, and that they serve a copy of such report upon the Plaintiff.

SO ORDERED

Rhonda Reid-Winston
Associate Judge
Signed in Chambers

EXHIBIT K

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MARY SOPHIA SMITH,
Plaintiff

FILED
JUN 24 2003

v.
VIRGINIA AVENUE, LLC and
403 C STREET, LLC et al
Defendant

Civil Action. No. 01ca006295
Judge Reid-Winston
Calendar 12

ORDER

These matters, are before the Court on Plaintiff's Motion for Declaration and Request for Clarification; Plaintiff's Motion for Reconsideration; and Defendants' Oppositions thereto. Upon consideration of Plaintiff's motions, Defendants' oppositions, and the entire record herein, the Court on this 18th day of June, 20003, hereby

ORDERS that Plaintiff's Motion for Declaration and Request for Clarification be and hereby is Denied ; and the Court

FURTHER ORDERS that Plaintiff's Motion for Reconsideration be and hereby is DENIED.

SO ORDERED.

Rhonda Reid Winston
Associate Judge
(Signed-in-Chambers)